

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division**

ELIZABETH SINES, ET AL.,

Plaintiffs,

v.

JASON KESSLER, ET AL.,

Defendants.

Civil Action No. 3:17-cv-00072

**DEFENDANTS LEAGUE OF THE SOUTH, MICHAEL HILL, & MICHAEL TUBBS'S
RESPONSE TO PLAINTIFF'S MOTION IN LIMINE AND PLAINTIFF'S RESPONSE
TO DEFENDANT'S MOTION IN LIMINE**

Defendants League of the South, Michael Hill, and Michael Tubbs, by and through Counsel, moved this court for a pre-trial order on the admissibility of the following evidence:

1. The Heaphy Report,
2. Michael Tubbs's felony conviction, and
3. The following adjudicative facts:
 - a. On June 13, 2017, Jason Kessler obtained a permit from the City of Charlottesville to conduct a demonstration at Emancipation Park on August 12, 2017.
 - b. On August 7, 2017, the City of Charlottesville attempted to revoke Kessler's permit to conduct a demonstration at Emancipation Park on August 12, 2017.
 - c. On August 11, 2017, this Court enjoined the City from revoking Kessler's permit to hold a demonstration at Emancipation Park on August 12, 2017.

Plaintiffs filed a motion asking this Court to exclude the Heaphy Report and a Response to Defendants' Motion in Limine.

I. The Heaphy Report

Plaintiffs first argue that the Heaphy Report does not qualify as an exception to the hearsay rule because it is hearsay. Plaintiffs' argument is circular and lacks merit.

Plaintiffs also argue that the Heaphy Report is unreliable. Plaintiffs' argument misunderstands the Report and is internally inconsistent with arguments in the same court filing. In their court filing, plaintiffs argue on the one hand that the Heaphy Report is unreliable, but then argue that two newspaper articles from thirty years ago are reliable enough to provide a basis for the admission of Michael Tubbs' thirty-year-old felony conviction. A side-by-side comparison of the Heaphy Report and the two articles submitted by plaintiffs shows that the Heaphy Report qualifies as reliable under plaintiffs' own standard.

The newspaper articles that plaintiffs offer were written thirty years ago. By contrast, the Heaphy Report was produced less than five years ago. The Heaphy Report is based on a review of hundreds of thousands of documents and interviews with dozens of witnesses. The newspaper articles that plaintiffs offer are significantly based on the statements of someone associated with "Klanwatch, a not-for-profit group that monitors extremist groups." This Court has reason to trust the reliability of the work of Mr. Heaphy, the former U.S. Attorney for the Western District of Virginia. Plaintiffs have failed to proffer facts to establish the reliability, independence, or impartiality of Klanwatch. Plaintiffs have provided no persuasive reason to believe that the Heaphy Report was not an independent and thorough investigation of the events of August 12, 2017, and therefore, it should be admitted as evidence in this trial.

Defendants only wish to introduce pages 127 through 139 of the Heaphy Report. Most of that information is based on bodycamera footage and other publicly available video footage.

II. Michael Tubbs's Felony Conviction

Pursuant to FRE 609, defendants previously moved this Court for an order barring plaintiffs from introducing evidence or making mention at trial of Michael Tubbs's felony conviction. Defendants argued that evidence of Michael Tubbs's felony conviction was inadmissible because the conviction occurred more than ten years ago, and plaintiffs had not provided sufficient advanced written notice of an intent to introduce such evidence, as required by the Rules of Evidence.

The first notice provided by plaintiffs that they intend to introduce evidence of Michael Tubbs' thirty-year-old felony conviction was in a court filing on October 12, 2021. This is insufficient advanced notice as required by the Rules of Evidence, and for that reason, this Court should exclude it. October 12, 2021 is less than two weeks before trial and defendants are prejudiced by this late disclosure because they lack sufficient time to investigate or substantiate the claims that plaintiffs are suddenly making about the thirty year old conviction.

Plaintiffs' other arguments are unpersuasive that Tubbs' thirty year old conviction qualifies for admissibility under other rules of evidence. Plaintiffs have failed to establish any connection between Charlottesville and Tubbs' felony conviction. Plaintiffs admit that Tubbs was not even a member of the League of the South until 2000 and the League of the South did not even exist at the time of Tubbs' felony conviction. Plaintiffs have failed to establish that anyone involved in the felony case, other than Tubbs, was also involved with any part of Charlottesville. In addition, plaintiffs rely on thirty-year-old newspaper articles to establish the relevancy of the conviction. Plaintiffs have submitted one court filing in support of their position, but nothing in the court filing establishes the relevancy of the conviction. The unsubstantiated information in thirty year old newspaper articles is insufficient to rebut the presumption against the admissibility of an over thirty year old conviction.

III. Judicial Notice of Jason Kessler's Permit

Defendants rely on their arguments already submitted in support of this Court taking judicial notice of certain facts.

Respectfully submitted,

/s/ Bryan J. Jones
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CERTIFICATE OF SERVICE

I certify the above was served on October 12, 2021 on all ECF participants and that parties requiring service by other means were served as follows:

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